

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

GERBER POULTRY, INC.

and

Cases 8-CA-35368  
8-CA-35685  
8-CA-35817

UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL NO. 880, AFL-CIO, CLC

*Cheryl A. Sizemore and Paul C. Lund, Esqs.*, for the  
General Counsel.  
*W. Eric Baisden, Laura K. Kendall, and John R.*  
*Cernelich, Esqs.*, for the Respondent.  
*Mr. Louis Maholic and Mr. Timothy P. Mullins* for  
the Charging Party.

DECISION

Statement of the Case

George Carson II, Administrative Law Judge. These cases were tried in Cleveland, Ohio, on May 10, 11, and 12 and June 14 and 15, 2005. The hearing in May was held pursuant to an amended consolidated complaint that issued on April 14, 2005. On May 10, I approved an all party informal settlement that partially settled the allegations in Case 8-CA-35685 and all of the allegations in Case 8-CA-35498, which I severed, and that case number has been deleted from the caption. Due to the illness of one of the Respondent's witnesses, I adjourned the hearing sine die. During the adjournment, the investigation was completed in Case 8-CA-35817, and a complaint issued on May 27, 2005. Counsel for the General Counsel moved that Case 8-CA-35817 be consolidated with Cases 8-CA-35368 and 8-CA-35685. I granted the motion on June 8, 2005. The hearing resumed on June 14 and closed on June 15, 2005.<sup>1</sup>

The complaints allege that the Respondent violated Section 8(a)(1) of the Act in various respects and violated Section 8(a)(3) of the Act by warning Carlos Manuel Garcia, issuing him an unfavorable evaluation, and denying him a wage increase, by warning and discharging Stacey Zurcher, and by taking various adverse actions affecting the terms and conditions of employment of Otto Ortiz including involuntarily transferring him, suspending him, warning him, and discharging him. As hereinafter discussed, I find that the Respondent did violate Section 8(a)(1) in some respects, but not in others, that the Respondent violated Section 8(a)(3) of the Act with regard to the evaluation and denial of a wage increase to employee Garcia, but did not violate the Act by warning him, that the Respondent did not violate the Act with regard to employee Zurcher, and that the Respondent did violate the Act in various respects with regard

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<sup>1</sup> All dates are in 2004 unless otherwise indicated. The charge in Case 8-CA-35368 was filed on October 19 and was amended on November 15 and January 28, 2005. The charge in Case 8-CA-35685 was filed on March 11, 2005, and was amended on March 30, 2005. The charge in Case 8-CA-35498 was filed on May 5, 2005, and was amended on May 13 and 23, 2005.

to employee Ortiz, including specifically his transfer, warning, and discharge, but did not violate the Act by suspending him for distributing a defamatory leaflet.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

## Findings of Fact

### I. Jurisdiction

The Respondent, Gerber Poultry, Inc., the Company, is an Ohio corporation engaged in the processing, sale, and distribution of poultry at its facility in Kidron, Ohio. The Respondent annually sells and ships products valued in excess of \$50,000 directly to points outside the State of Ohio. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Food and Commercial Workers Union, Local No. 880, AFL-CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

#### *A. Background*

On June 12, 2001, Union Organizer Timothy Mullins obtained employment at the Company. A petition for an election was filed on August 19, 2003, and an election was held in October 2003. The Union lost the election by a vote of 120 to 77. The Union filed an unfair labor practice charge and objections to the election. Mullins quit in late November 2003. The unfair labor practice case was settled by an informal settlement approved by the Regional Director for Region 8 on June 17. The objections to the election were withdrawn pursuant to the settlement. The settlement provides, inter alia, that the Company will revise the solicitation rule in its employee handbook “to prohibit solicitation during working time only.”

At the representation election in October 2003, the observers for the Union were Carlos Manuel Garcia, Stacey Zurcher, Arterio Rosales and Joe DeMondo. The Company observers included Otto Ortiz. The earliest unfair labor practice alleged in the various complaints occurred in June. The bulk of the alleged violations of the Act occurred in and after October 2004 when employee Ortiz ceased to support the Company and began supporting the Union.

#### *B. Allegations Concerning Carlos Manuel Garcia*

##### 1. The Evaluation and Denial of a Wage Increase

Carlos Manuel Garcia, referred to as “Mani,” was employed on June 18, 2001, and he became a line leader July 9, 2001. Garcia supported the Union in its organizational campaign, speaking with employees and attending union meetings. He served as an observer for the Union at the election. Prior to his involvement with the Union, Garcia had received superior evaluations accompanied by wage increases. Evaluations consist of six elements, each rated with a score of 1 to 5. Garcia’s evaluation of June 25, 2003, reflected a perfect score of 30, and he received a wage increase of 35 cents per hour. His evaluation of June 23, 2004, eight months after the election, reflected a score of 23, and no wage increase was granted. The first

factor on the evaluation, “Attitude,” is rated 3, average, and contains the following statement: “He has a good attitude but he lets outside influences effect his performance here.”

When the evaluation was given to Garcia by Tray Pack Supervisor Cathy Rhodes, he questioned her about it. Garcia wrote on the evaluation, “What do you mean about outside influence, can you be more specific, because I don’t understand ...” Rhodes told Garcia that “those words didn’t come from her.” She said that “probably ... that comment was made because of what I ... had done the previous year.” Supervisor Cathy Rhodes did not testify.

The Tray Pack Department is one of several departments in Second Processing. Supervisor Cathy Rhodes reports to Superintendent of Second Processing Rebecca Rhodes, who is her daughter. Superintendent Rebecca Rhodes claims to have briefly reviewed the first few entries on Garcia’s evaluation and questioned her mother, Supervisor Cathy Rhodes, regarding the attitude entry. She testified that Supervisor Rhodes attributed the rating to Garcia’s “tendency to let friendships in the department overrule decisions.” I do not credit Superintendent Rhodes’ testimony that her mother attributed the “outside influences” comment to “friendships in the department.” Friendships in the department would be characterized as exactly that, not as “outside influences.” I credit Garcia’s undenied testimony that his Supervisor Cathy Rhodes informed him that those words “didn’t come from her.”

Regarding Garcia’s job performance, Superintendent Rebecca Rhodes testified that Garcia had been acting supervisor during one week in January when Supervisor Cathy Rhodes was on vacation. According to Superintendent Rhodes, production was at 88 trays packed per minute instead of the goal of 105. She testified that, on one occasion that week, she observed that employees were standing around. She spoke with Garcia who explained that the employees were “almost done.” She directed Garcia to “[k]eep who you need and send the rest home.” Superintendent Rhodes did not testify that she observed employees neglecting their work. If that had been the case, she would have directed Garcia to tell the employees to quit loafing and get to work. There is no evidence that Acting Supervisor Garcia had the authority to send employees home prior to the end of their normal shift. Superintendent Rhodes did not claim to have counseled Garcia regarding his failure to direct any employee to leave before completion of the shift. There is no evidence that Superintendent Rebecca Rhodes advised Supervisor Cathy Rhodes that she had observed any problem with Garcia’s job performance.

Factor 6 on the evaluation form is “Team Player.” When rating that factor, Cathy Rhodes wrote: “When I was on vacation he did a very good job of running the department.”

Controller John Metzger, the chief financial officer of the Company, oversees the Human Resources Department. One of his functions is serving on the Review Committee, which reviews employee evaluations and recommends wage increases. Metzger testified that during the review of Garcia’s evaluation Supervisor Cathy Rhodes reported that, when she was on vacation, Garcia failed “to carry out job tasks in the manner in which she had directed him.” Metzger acknowledged that he did not question Supervisor Rhodes regarding what directions Garcia had failed to follow. I do not credit Metzger’s report of what Supervisor Rhodes allegedly told him. His testimony is directly contradicted by Supervisor Rhodes’ statement in Garcia’s evaluation that, “[w]hen I was on vacation he did a very good job of running the department.”

Metzger testified that Garcia did not receive a wage increase because the evaluation yielded a total score of 23. He pointed out that, even if Garcia had repeated his prior perfect score of 30, the maximum rate for the position, as set out in the Company wage scale, was only 10 cents an hour more than he was making. Metzger acknowledged that management had discretion regarding wages and “can go beyond the wage scale.” It did so with regard to line

leader Renee Wolf who operates the computerized processing system and line leader Juan Ruiz, both of whom received 25 cent an hour raises which placed them at rates higher than those shown on the wage scale.

5 Garcia recalled that, after the week he served as an acting supervisor, he was informed that production had been lower by 18 per cent, a figure consistent with Superintendent Rebecca Rhodes' testimony regarding the average number of trays processed. There is no evidence attributing the decrease in production to any dereliction on the part of Garcia rather than a  
10 plantwide decrease in production. In a departmental meeting following the week in which Supervisor Rhodes was on vacation, Garcia recalled that Metzger "mentioned that when the supervisor wasn't there, we did a good job." Metzger did not deny making that comment.

15 In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Garcia engaged in union activity and that the Respondent had knowledge of that activity. I find that the Respondent bore animus towards the Union and employees who engaged in union activity. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for Respondent's unfavorable evaluation of Garcia and the denial of a wage increase to him. *Manno Electric*, 321 NLRB 278 (1996).

20 The Respondent argues in its brief that "outside influences" referred to Garcia's "having failed to manage the department effectively" when he was the acting supervisor. I have not credited the testimony of Superintendent Rhodes or Metzger that Cathy Rhodes made such a claim. There is no evidence establishing that Garcia did other than the "very good job of running  
25 the department" for which Supervisor Cathy Rhodes complimented him in his evaluation.

30 The General Counsel argues that I should draw an adverse inference from the failure of Supervisor Cathy Rhodes to testify. I agree. I have before me un rebutted credible testimony that the words in Garcia's evaluation relating to "outside influences" did not come from the supervisor who wrote those words. The failure of the Respondent to present Supervisor Cathy Rhodes compels the conclusion that the reference was to Garcia's union activity.

35 The Respondent argues that Garcia's June 23 evaluation reflected the Respondent's "general satisfaction with his work," and that with a perfect score of 30 he would have received only a 10 cent an hour raise or, with a score of 28 or 29, a 5 cent an hour raise. The foregoing argument ignores Metzger's admission that management maintained the discretion to grant increases in excess of the wage scale. The raises granted employees Wolf and Ruiz establish that management exercised that discretion. Although Garcia's June 23 evaluation was above average, on the basis of the evaluations that he had received prior to engaging in union activity,  
40 the evaluation was unfavorable.

45 I find that the June 23 evaluation of Garcia, which assessed his attitude at 3 due to "outside influences," a reference to the Union, was not a fair assessment of his performance as determined by his direct supervisor. I find that the evaluation reflects lower performance figures than Garcia would have received if his supervisor, who commented upon the "very good job" that he did in her absence, had not been directed to place words relating to "outside influences," words that "didn't come from her," in his evaluation. I further find that, but for the foregoing, Garcia would have received a wage increase of at least the amount given to comparable line leaders. By issuing an unfavorable evaluation to Garcia and denying him a wage increase because of his union activities, the Respondent violated Section 8(a)(3) of the Act.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act in that

Supervisor Cathy Rhodes “made a coercive statement to an employee during his annual appraisal that his union activities adversely affected his appraisal.” When Garcia asked Supervisor Rhodes about the reference to “outside influences,” she responded that “probably ... that comment was made because of what I ... had done the previous year.” Referring to a union as an outside influence does not violate the Act. Although I have found that the “outside influences” comment did refer to Garcia’s union activities and that those activities affected his appraisal, Rhodes’ response related to the term “outside influences,” not the appraisal. I shall recommend that the separate Section 8(a)(1) allegation be dismissed.

## 2. The Warning

In early December, as a result of a submission to the Company suggestion box signed by all employees in the Tray Pack Department, management met with the employees to explain the evaluation process and its wage policy. There were two meetings, the first on December 9 and the second on December 16. Controller John Metzger gave the explanations at both meetings. He was accompanied by Compliance Manager Glen Mott, who assures compliance with United States Department of Agriculture (USDA) regulations for food processing facilities and oversees the Quality Control Department, and Human Resources Representative Karina Kolm, who serves as an interpreter for the Company and who translated for Metzger. Garcia was not present on December 9. On December 16, Garcia was present and acknowledges that, when Metzger completed his presentation, he asked for questions. None were immediately asked, and Metzger left. Garcia testified that he then referred to an incident of Hispanic employees wrapping a pallet, presumably a higher paying job that the “American” employees normally performed. Kolm testified that Garcia spoke of the Hispanic employees being taunted, that he claimed the “Americans” had been laughing at them. She reported the foregoing to Metzger. Both Metzger and Mott were extremely upset by Garcia’s accusation of harassment because Hispanic employees constitute 80 to 85 per cent of the Company’s workforce.

Metzger directed Superintendent Rebecca Rhodes to contact Ramon Martinez, supervisor of the department in which the Hispanic employees who had allegedly been harassed worked, to investigate the matter. She did so. Supervisor Martinez is bilingual, and he served as her interpreter. The Hispanic employees, according to Superintendent Rhodes, denied having been harassed. Thereafter, rather than meet with Garcia to determine whether he could identify the employees that had allegedly been harassed and the date of the alleged harassment, Metzger and Mott called another meeting of the Tray Pack department. Mott testified that he requested that Garcia repeat what he had stated and then questioned Garcia regarding whether, and if so to whom, he had previously reported the incident. Garcia testified that Mott refused to let him speak, stating that he, Garcia, had had his say. Garcia and Mott agree that Mott spoke disparagingly of Garcia, telling the Tray Pack employees that Garcia was a liar and that he “would caution you personally in believing anything he tells you individually about that type of things that we’re discussing here because he cannot be trusted in that.”

Metzger asked whether any employees were aware of the incident. He recalled that two or three indicated that they were. Garcia testified that two employees, Juan Velarde and Jose Claludio Colon, confirmed that they were aware of the incident. The remaining employees were dismissed from the meeting.

All witnesses agree that the two or three employees who claimed to have witnessed the incident, Garcia, translator Kolm, Superintendent Rebecca Rhodes, Metzger, and Mott remained. Each of the Company witnesses testified that none of the employees who had claimed to have witnessed the alleged incident, when specifically questioned about it, admitted to having actually seen it. Metzger testified that he asked each of the employees who claimed to

have witnessed the incident about the incident and that each answered that that he had not actually witnessed it, but had been informed of it by Garcia. Garcia testified that Velarde and Colon both confirmed that they had witnessed Hispanic employees performing the work of wrapping a pallet and that Colon specifically stated that the Americans “were just standing there and laughing.” Despite the witnesses having corroborated his report, Garcia testified that Metzger dismissed them from the meeting. Garcia testified that, upon further questioning by Metzger and being called a liar by Mott, he “acknowledged that I was the guilty one.” He testified that he did so because he “wanted to get out of there.”

The complaint alleges that Garcia was interrogated and harassed in violation of Section 8(a)(1) and warned in violation of Section 8(a)(3) of the Act on December 16. The warning for “Failure to Accurately Report ...” is dated December 20. There is no evidence of any violative interrogation relating to union activity. The events of December 16 were precipitated by Garcia’s complaint. Although he testified that his complaint related to Hispanic employees not being paid for performing work normally performed by American employees, translator Kolm testified that Garcia asserted that the Hispanic employees were being taunted when performing that work. Garcia was not recalled to deny that testimony. Garcia was not questioned about, and did not identify, the employees who were allegedly harassed. Although I agree with the General Counsel that Mott’s remarks about Garcia in the presence of Tray Pack employees were humiliating, there is no evidence that Mott made those intemperate remarks because of Garcia’s union activity rather than what the Respondent believed was an unfounded accusation of discrimination against Hispanic employees.

The General Counsel argues that I should credit Garcia’s claim that the employees who purportedly witnessed the alleged incident informed Metzger of that fact. Metzger, Mott, Kolm, and Rhodes each testified that the employees denied having any direct knowledge of the incident, and it was only then that they were dismissed. The General Counsel did not present either of the employees who Garcia testified stated that they had witnessed the incident.

The General Counsel contends that Garcia’s admission that he was the guilty one should be disregarded arguing that Garcia, “humiliated and in tears, yielded to management officials and admitted that he was guilty, solely because he wanted to leave the room.” Confessions are not pretty. Garcia testified, and Mott confirmed, that he became tearful in the meeting. I need not decide whether Garcia became tearful because of the manner in which he was being spoken to or because of untruthful statements that he had made. The General Counsel did not corroborate Garcia’s claim that two employees asserted to Metzger that they had witnessed the harassment by calling either of them as a witness. There is no testimony from any one of the employees who was allegedly harassed. There is no evidence establishing that Garcia did not speak truthfully when he admitted that he was the guilty one.

The General Counsel has not established that Garcia was interrogated and harassed in violation of Section 8(a)(1) of the Act. The Respondent has rebutted the General Counsel’s prima facie case regarding the issuance of a discriminatory warning motivated by Garcia’s union activity. I shall recommend that those allegations be dismissed.

### *C. Allegations Concerning Stacey Zurcher*

#### *1. Facts*

Stacey Zurcher worked for the Company on three separate occasions, the most recent beginning in November 2002. During that, her final period of employment, she worked initially in the labeling department and then in the sizing department. She supported the Union in its

organizational effort of 2003 and served as a union observer at the October 2003 election. Organizational activity resumed in the autumn of 2004, and Zurcher signed an authorization card on October 16. Zurcher sought and obtained a transfer to the Quality Control Department in November 2004.

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All Company managers and supervisors who testified denied knowledge of any current union activity by Zurcher. The most recent union related conversation between Zurcher and a manager occurred in June, shortly before the scheduled June 20 hearing on the objections to the election filed by the Union. Union Organizer Timothy Mullins had contacted Zurcher to determine the whereabouts of Joe Demando, who had also served as an observer for the Union. Zurcher confirmed to Mullins that he was still living at the same address. She did not volunteer that she rode to work with him each day. When riding to work with Demando the following day, Zurcher informed him that Mullins was seeking to contact him. Later, while she was performing her job on the sizing line, Compliance Manager Glen Mott spoke with her. According to Zurcher, Mott said that he understood that she had a visitor. She asked what he was speaking about, and Mott identified Mullins. Zurcher confirmed that she had spoken to Mullins. Mott asked if she would let him know if he came by again, and Zurcher responded that she would. Mott recalled that employee Demando complained that he “was being pestered” as was Zurcher. Mott says that he informed Zurcher of his conversation with DeMondo and asked if there was “anybody visiting her from the Union or bothering her.” Zurcher said, “No,” and Mott stated that if there was a problem she could let him know “and there are some ways we can get that taken care of.” There are no allegations relating to the foregoing June conversation.

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Zurcher’s job duties in Quality Control involved performing various tests and monitoring the cleanliness of the facility by making facility checks. Facility checks are performed twice daily and the quality control employee performing that function fills out a document containing a check list of 40 separate line items. On March 22, 2005, Zurcher received a documented verbal counseling for not performing a facility check. Zurcher testified that she informed her supervisor, Joan Himes, that she had made the check but had not documented that she had done so because she could not locate the facility check document upon which the morning check had been recorded. According to Zurcher, Supervisor Himes informed her that she had been directed by Compliance Manager Mott to write up Zurcher.

Himes did not testify. Mott confirmed that he had directed Himes to write up Zurcher because prior problems with her work performance had not been documented.

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On April 5, 2005, Zurcher failed to refrigerate a solution that was to be tested for e-coli bacteria. Mott learned of this simultaneously with a report that Zurcher had failed to complete temperature checks. He also learned that Zurcher had failed to swipe her card reflecting her arrival or departure from the plant. On April 6, 2005, Zurcher was issued a warning. At the disciplinary meeting Zurcher stated that she “thought” that she put the e-coli test in the refrigerator, but she did not dispute Supervisor Hime’s statement that she had not done so. Zurcher did not deny failing to perform temperature checks but stated that she understood that they were not the first priority and that she understood that if she did not get to them that she did not “need to do them.” She explained that she swiped in with her card near the Human Resources office but swiped out in the lunchroom area. Mott responded that he did not believe the difference in locations mattered. Zurcher and Mott agree that he asked if she would like to be transferred from the Quality Control Department. Zurcher recalls Mott stating that, if she could not do her job, the Company did not want to terminate her but would “move me to another department where I can work, do a good job.” She declined the offer.

On Monday, April 18, 2005, Zurcher felt ill. Despite this she worked. On Tuesday, she

missed work. On Wednesday, April 20, 2005, although still feeling ill, she came to work but left at 5:35 p.m., prior to completing her shift. Prior to leaving she requested a fellow employee to perform the work that she had not completed, and that employee did so. Zurcher admitted that she knew that she should notify a supervisor before leaving and testified that she attempted to do so, going to Compliance Manager Mott's office, seeing that the light was on but that he was not there, and then going into the plant and unsuccessfully looking for him or her supervisor. She returned to Mott's office, but the light was out, indicating to her that he had left. Zurcher left. As she was leaving, she encountered Night Superintendent Mike Temple coming into work. She says that she said "Bye," as she passed him.

Zurcher worked the following day, but did not mention to her supervisor that she had left early the previous evening. Her supervisor did not mention her having left. On Friday, April 22, 2005, Zurcher was called to a meeting with her supervisor Joan Himes, Superintendent of Second Processing Rebecca Rhodes, and Compliance Manager Mott. Mott stated that she had walked off the job on Wednesday night and asked why she had not told anyone. Zurcher answered that she had unsuccessfully looked for him. Mott asked why she had not informed Superintendent Rhodes, and Zurcher replied that Rhodes was not her supervisor. She asked for a second chance. Mott answered that it was "too late" for that, that she was terminated.

The Respondent presented evidence that on August 16, employee Angel Dias Soto was discharged for leaving without permission and for failing to assure that the work for which he was responsible was completed.

The General Counsel presented evidence that, at the representation election in October 2003, the observers for the Union were Garcia, Zurcher, Arterio Rosales and Joe DeMondo. Following the October 2003 election, at some point, the record does not establish when, employee Rosales was transferred and promoted to a supervisory position and employee DeMondo, who Organizer Mullins was seeking to contact regarding the scheduled hearing on objections, was transferred to quality control. Zurcher was discharged on April 22, 2005.

## 2. Analysis and Concluding Findings

Zurcher engaged in union activity and the Respondent had knowledge of that activity. The Respondent bore animus towards the Union and employees who engaged in union activity, and the counseling, warning, and termination of Zurcher were adverse actions directly affecting her employment. The General Counsel presented a prima facie case.

The General Counsel, citing the alleged discrimination against Garcia, the promotion to a supervisory position of employee Rosales, and the change in attitude of employee DeMondo following his transfer, argues that the Respondent sought to stamp out the last vestige of union leadership among its employees by terminating the remaining union observer Zurcher and, in May 2005, terminating employee Otto Ortiz who had begun supporting the Union.

The Respondent argues that it had no knowledge of any current union activity on Zurcher's part. Retaliation for current union activity is not a prerequisite to a finding of discriminatory conduct by an antiunion employer. It has long been recognized that "there is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will." *Marcus Management*, 292 NLRB 251, 262 (1989). Nevertheless, I find that the Respondent established that it would have taken the same actions against Zurcher even in the absence of her union activity.

The discipline of March 22, 2005, was a verbal counseling, a lesser form of discipline

than a warning. It is undisputed that the Respondent documents its daily facility checks pursuant to its internal procedures that assure compliance with USDA regulations. Zurcher admitted that she did not complete the facility check form with its 40 separate line items, but maintained that she had, nevertheless, performed the check. She did not contemporaneously report to a supervisor that she could not locate the form upon which the morning check had been recorded. She did not obtain a new form upon which to record the afternoon check.

On April 6, 2005, Zurcher was warned for leaving an e-coli test unrefrigerated, failing to perform temperature checks, and failing to properly swipe in and out of the facility. At the meeting when the warning was given to her, Zurcher does not claim that she disputed any of the issues that were raised. She acknowledged that she declined Mott's offer to transfer her if she was unable to properly perform her job in the Quality Control Department.

On April 20, 2005, Zurcher left work without notifying a supervisor. The employee handbook, at page 24, provides that employees may be terminated for leaving a department or the plant without permission. Zurcher gave no explanation of her conduct to her supervisor on the following day. On April 22, she was terminated for having left the plant without permission.

The Respondent, on April 6, 2005, when warning Zurcher for various shortcomings in her performance, offered to transfer her, an offer inconsistent with a determination to terminate her employment. Zurcher admitted leaving the facility on April 20, 2005, without contacting a supervisor. Zurcher's attempts to locate Mott, including returning to his office, if true, confirm her testimony that she aware of her obligation to assure that supervision knew that she was leaving. What is not explained by Zurcher's testimony is why she would not, having made the foregoing diligent but unsuccessful search for a supervisor that she claims to have made, immediately stopped Night Superintendent Mike Temple when she encountered him entering the plant as she was leaving, explained that she was ill and had unsuccessfully sought to locate a supervisor, and requested his permission to leave. Her failure to do so suggests that Zurcher, having obtained a commitment from a fellow employee to complete her work, simply left. She realized the consequences of her action on April 22 when Mott confronted her regarding why she walked off the job and defensively asserted that she could not find him.

The General Counsel presented no evidence of disparate treatment. Admittedly, employee Soto, who left without notifying a supervisor, was also cited for failing to obtain coverage for his work. There is no evidence, however, that the Respondent's termination decision would have been different in the absence of that aggravating factor. There is no evidence that any employee who has left without notifying a supervisor has not been terminated. Zurcher had the opportunity to obtain permission to leave from Night Superintendent Mike Temple whom she saw as she was leaving but did not attempt to do so. I find that the Respondent has rebutted the General Counsel's prima facie case. *Rudy's Farm Co.*, 309 NLRB 1338,1346-1347 (1992).

I shall recommend that the allegations of discrimination against Stacey Zurcher be dismissed.

#### *D. Allegations Concerning Otto Ortiz*

##### 1. Background

Otto "Johnny" Ortiz began working for the Company in April 2003. During the 2003 organizational campaign of the Union, Ortiz supported the Company. He speaks English and assisted the Company by translating the Company's message to employees who spoke only

Spanish. Shortly before the election, Ortiz was called to a meeting that included employees Renee Wolf and Ramon Martinez, Superintendent Rebecca Rhodes, and Compliance Manager Mott in which an employee list was reviewed and the participants discussed which employees supported the Company and which supported the Union. The meeting also included discussion of the employees' duties as observers. Ortiz served as an election observer for the Company.

From 2003 until late August or early September, Ortiz worked in the Shipping and Order Processing Department, which is referred to by that name or interchangeably as Shipping or Order Processing, operating a tow motor to fill customer orders and load them onto trucks for delivery. At the Company's processing plant, the Company also operates a Retail Store from which raw and cooked chicken is sold directly to customers from a meat counter and also from which wholesale sales are made directly to customers who come to pick up the product. Eight female employees perform the regular retail work. Additionally, there is an order processing employee who obtains the product needed for sale at the meat counter and who fills wholesale orders presented at the Retail Store. That position is designated as the Customer Assistant.

From late 2003 until late August or September 2004, the Retail Store Customer Assistant was Elton Snowden, who had requested to work in that position. In late August or September, Snowden was removed from that position for the offense of "abuse of time." Prior to June, Snowden had been supervised by Michael "Mike" Bowen, supervisor of Shipping and Order Processing. In June, Ruth Miller, who had been the lead employee among the female employees in the Retail Store, was promoted to supervisor, and she assumed supervisory responsibility for the Retail Store Customer Assistant. Snowden's personnel file includes two warnings signed by Miller, one dated June 10 and the other dated August 13, both for taking unauthorized breaks. Snowden's evaluation of August 18 was processed by Human Resources on September 7 but was not signed by Snowden until September 20. The record does not establish whether he was still assigned to the Retail Store when he signed the document.

Shortly after Snowden was transferred, Shipping Supervisor Mike Bowen assigned Otto "Johnny" Ortiz to perform the work for the Retail Store. Ortiz continued to report to Bowen. Initially he reported to work at 8 a.m. He was thereafter asked to start reporting at 7 a.m. when the Retail Store opened. When Ortiz finished his duties in the Retail Store he would return to Shipping and Order Processing to perform whatever work needed to be completed. He testified that this resulted in his earning considerable overtime.

In the summer of 2004, Ortiz was assigned to assist in the Retail Store one weekend. President Michael Gerber regularly grills chicken that is sold to the public on summer weekends. On the occasion in question, Gerber needed more chicken. Ortiz had gone to the restroom. When Gerber encountered Ortiz, he yelled at him, according to Ortiz "like I was a horse," and stated, "If you don't like this job, call your supervisor to send somebody better than you." Ortiz considered the foregoing encounter and statement to have been humiliating. Thereafter, in September, he contacted Union Organizer Mullins who he knew had been employed at the Company. After speaking with Mullins, Ortiz began engaging in activity on behalf of the Union, including designing and wearing to work a prounion t-shirt.

The Respondent, in its brief, contends that it became aware of Ortiz's support for the Union on November 12 when Ortiz engaged in picketing. As hereinafter discussed, Controller Metzger assumed that Ortiz was engaged in union activity when he received a report on October 18 that Ortiz had been speaking to an employee in another work area, and he admitted speaking to Ortiz on September 20 after he received a report from Supervisor Bowen that an employee was complaining about Ortiz because the employee "just doesn't want to hear anything about the Union ...."

## 2. The Incidents on October 18 and 20

On October 18, Eliza Kasnyak, an employee in the Human Resources Department who, like Human Resources Representative Karina Kolm, served as a translator, was asked by Metzger to walk around the facility when the supervisors were attending a meeting. When doing so, Kasnyak observed Ortiz speaking with an employee identified as Mario and overheard him saying, “[I]t’s going to be alright.” Ortiz had a blue paper in his hand. Thereafter she observed Mario leaving the Work in Progress cooler, referred to as the WIP cooler, that is adjacent to the Retail Store and that is used by various employees in the course of their work duties, but chiefly by the Retail Store Assistant. Kasnyak reported to Metzger what she described as “suspicious” behavior by Ortiz. Metzger did not speak with Mario. He called Ortiz to the Human Resources office and informed him that he had received a complaint from an “employee who had overheard a conversation and was offended.” Ortiz asked who was the employee and what did he say. Metzger claimed that he did not know and informed Ortiz, “You have no right to talk to employees.” On cross-examination, Ortiz agreed that Metzger specifically informed him that he was “not to discuss the UFCW or support for the UFCW during the working time.” Metzger admitted that he did not identify the source of his information. He says he told Ortiz that he was “not to engage in activities regarding union organization” except on nonworking time.

Kasnyak, the source of the “suspicious” behavior report, testified that Mario was the person to whom Ortiz had spoken. Ortiz was recalled as a witness and explained that, having been unable to find a supervisor, he gave an order for chicken livers, the blue piece of paper, to Mario, the forklift driver.

On October 19, the Company held a meeting with its supervisors to review the solicitation rule that had been revised in July pursuant to the settlement approved by the Regional Director on June 17. Controller Metzger testified that the meeting was held because the Company had become aware of renewed union activity. The memorandum that he distributed at the meeting notes that it is “impossible and unnecessary to prevent employees from having occasional personal conversations, [but] it is important that we are all active and visible in the work place in order to prevent employee solicitation during working time.”

The next day, on October 20, Metzger had Supervisor Bowen bring Ortiz to the WIP cooler. This meeting occurred after employee Claude Cottrell informed Bowen that Ortiz had approached him “asking him questions” relating to the Union and the “he [Cottrell] didn’t want to be bothered with that.” Metzger, although asserting that Ortiz had “solicited” Cottrell, testified that the report that he received from Bowen was that “the employee ... just doesn’t want to hear anything about the Union ...” Ortiz testified that, upon entering the WIP cooler, Metzger asked whether Ortiz had understood their conversation of October 18. Ortiz replied that he had. Metzger then stated that apparently he did not understand because he had received another complaint that he had been “talking with somebody about the Union” about 5:45 p.m. the previous day. Ortiz answered that he had not, that at that time he had been taking a smoke break. Bowen interjected that Ortiz had not been on break, that someone had covered his break earlier. Ortiz testified that Metzger put his fist in his face and stated, “[T]his is your verbal warning.” Ortiz stepped backwards, away from Metzger’s fist. Metzger asked, “I want to know why are you with the Union.” Ortiz replied that he was not going to tell him, that “[i]t is my right.” He asked if there was anything else, Metzger said that there was not, and Ortiz left.

Metzger testified that he often speaks loudly, that he became cold while waiting for Ortiz in the WIP cooler and began moving his arms around to keep warm. Although denying that he made a fist, Metzger admitted opening and closing his fingers. I find that when his fingers were

closed his hand appeared to be in a fist. Metzger admitted that initially Ortiz was about five feet from him and that, in the course of the conversation, Ortiz stepped back so that they were further apart. He testified that he did ask Ortiz why he had solicited an employee after their conversation of October 18. He did not specifically deny that he asked Ortiz to tell him why he was “with the Union,” and that Ortiz refused to tell him. I credit Ortiz.

The complaint alleges that the Respondent, on October 18, threatened an employee with unspecified reprisals. There is no evidence that Ortiz was threatened on October 18, and I shall recommend that this allegation be dismissed.

The Respondent has no rule prohibiting conversation among employees relating to nonwork related matters. Various employees testified that, during working time, they would engage in general conversation with their fellow employees. Supervisor Mike Bowen, when directly asked whether employees could talk about a ballgame during working time, answered that the employees should not do so “out of your general area.” The memorandum distributed to supervisors on October 19 acknowledges that employees may have personal conversations.

The Respondent argues that the conversations it had with Ortiz were held to confirm that he understood the Company’s valid no-solicitation rule that prohibits solicitation on working time. The credible testimony of Ortiz establishes that Metzger promulgated a gag rule that equated any statement relating to the Union with solicitation. The November issue of the Company newsletter states that the Company has a rule against solicitation during working time and then states, “This means that no employee should talk to you about the union when you are working.” An employer may not restrict union-related conversation while permitting conversation relating to other topics. *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003). The restriction upon discussion relating to the Union when there was no prohibition upon discussion of other nonwork subjects on company time violated Section 8(a)(1) of the Act.

The Respondent sought to enforce the foregoing unlawful restriction on October 20 when Controller Metzger confronted Ortiz after hearing that an employee with whom Ortiz had spoken did not “want to hear anything about the Union.” Although Metzger attributes his physical actions such as moving his arms and opening and closing his fingers to the cold of the WIP cooler, it was he who chose that location for the conversation. Metzger’s description of his physical actions is consistent with what Ortiz observed and what Ortiz perceived as physically threatening actions. After Metzger made a fist, Ortiz moved further from him. Metzger, who admits to speaking loudly, asked Ortiz, “I want to know why are you with the Union.” I find, as alleged in the complaint, that the Respondent physically threatened Ortiz because of his union activities and coercively interrogated him regarding the reason that he supported the Union in violation of Section 8(a)(1) of the Act.

### 3. Ortiz’s Transfer and Changed Working Conditions

#### *a. Facts*

On October 21, Ortiz was called to the Human Resources office. Vice President Tim Gerber and translator Karina Kolm were present. Vice President Gerber informed Ortiz that he was being permanently assigned to the Retail Store as the Retail Store Customer Assistant, that his pay would not change, and that his hours, from 7 a.m. until 6 p.m., would remain the same. Ortiz stated that he started in the Shipping Department, that he liked that department, and that he had not requested a transfer. Gerber replied that he “did it for me.” Ortiz asked “if he had anything else besides the store.” Gerber replied that Bowen did not “need you ... anymore” in Shipping, that he did not have any other openings, and “either you take it or there’s no job for

you.” Ortiz said he would take the job.

Translator Kolm confirmed that Ortiz protested the transfer, asking “Do I have to?”

5 Vice President Gerber confirmed that employee Eldon Snowden was involuntarily transferred from the Retail Store Assistant position because of “abuse of time.” Thereafter, the position was open, but “we didn’t have any applicants at the time that were suitable.” Despite the absence of any applicant for the position, including Ortiz who had been performing the job, Gerber “was interested in just moving Johnny [Ortiz] into the [Retail Store] position fulltime.” He testified that he spoke with Supervisor Mike Bowen to see if the assignment would cause “a shortage for him” in Shipping. Bowen indicated that it would not. According to Gerber, he asked Supervisor Ruth Miller “whether she was satisfied with the job” that Ortiz was doing and that she said that he was doing “a sufficient enough job that she was satisfied.”

15 Vice President Gerber acknowledged that, when he informed Ortiz of the impending transfer, Ortiz asked, “[D]o I really have a choice in this?” He replied, “[N]o, we made the decision to ... move you permanently.” Gerber denied threatening to fire Ortiz if he did not accept the position. He did not deny saying that Bowen did not “need you ... anymore in Shipping and that he did not have any other openings. I credit Ortiz and find that Gerber did make those comments. Although Gerber claims that he confirmed with Bowen that transferring Ortiz would not cause “a shortage for him,” he informed Ortiz that Bowen did not need him.

Supervisor Mike Bowen was not asked about any conversation with Vice President Gerber regarding the transfer of Ortiz. Supervisor Ruth Miller testified that Gerber informed her that he was going to transfer Ortiz to the Retail Store, that “he thought he [Ortiz] would be a good one” and that she agreed.

The pay rate for Retail Store employees is less than the pay of Shipping and Order Processing employees. Although Vice President Gerber informed Ortiz that he would maintain his pay rate, he did not explain that, because of the wage differential, Ortiz would be ineligible for a wage increase at the time of his annual evaluation. Gerber acknowledged that it would have been cheaper to have hired an employee “off the street” for the position to which Ortiz was transferred. General Counsel’s Exhibit 15 reflects hires in Shipping and shows that employee CHEW, presumably Jody Chewing, was hired on October 4 and employee EWIN was hired on October 18.

The Retail Store was not in the unit in which the representation election was held in October 2003. Vice President Gerber did not explain to Ortiz that Retail Store employees did not receive a morning and afternoon break. Miller’s uncontradicted testimony was that Retail Store employees do not get breaks. Approximately two weeks after he was permanently assigned to the position in the Retail Store, Supervisor Miller informed Ortiz of the absence of those breaks. Ortiz showed her the employee handbook which provides, “Employees are allowed, upon the direction of the immediate supervisor, to take two breaks during a workday ....” Miller informed him that the employee handbook did not apply to employees in the Retail Store. Miller explained that she was following the “orders ... of Mr. Tim Gerber.” She announced to Ortiz that his hours were being changed, that he was to continue to report to work at 7 a.m., but that his workday would end at 3:30. Miller also informed Ortiz that he was to keep her advised when he took a lunch or bathroom break.

After being informed of the foregoing changes, Ortiz asked Vice President Gerber about the change in his hours. Gerber answered that things were slow. Ortiz pointed out that the Retail Store did not close until 6:30 p.m. and asked, “Why are you sending me home at 3:30?”

Gerber did not answer.

The second page of Joint Exhibit 3, the job description for the Retail Store Customer Assistant, effective June 20, under the entry “Shift,” states “Retail Store Operating Hours.”

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*b. Analysis and Concluding Findings*

Pursuant to *Wright Line*, supra, I find that Ortiz, beginning in October, engaged in union activity and that the Respondent had knowledge of that activity. Ortiz had, shortly before the transfer, begun speaking on behalf of the Union with his fellow employees and wearing a prounion t-shirt. He had been counseled on October 18 after engaging in what had been reported to Controller Metzger as “suspicious” behavior. He had been threatened and interrogated by Metzger on October 20 after speaking in favor of the Union to an employee who did “not want to hear anything about the Union.” I find that the Respondent bore animus towards the Union and employees who engaged in union activity. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor in the involuntary permanent transfer of Ortiz to the Customer Assistant position with is less favorable working conditions and the elimination of his overtime opportunities.

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The Respondent presented no evidence establishing a need to permanently assign a Shipping employee to the Customer Assistant position in the Retail Store. There had, according to Gerber, been no suitable applicants for the position, which paid less than jobs in Shipping and had different and less favorable working conditions. The job had been performed to the satisfaction of management for over a month without making the job assignment permanent. The Respondent, in October, hired two new employees in Shipping. The Respondent has not established that Ortiz would have been permanently assigned to the Retail Store, a nonunit position, in the absence of his union activity. By involuntarily transferring Ortiz to a position with less favorable working conditions, the Respondent violated Section 8(a)(3) of the Act.

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The complaint alleges that Vice President Gerber “threatened an employee with termination if he did not take a job transfer.” The threat is implicit in Gerber’s statement to which Ortiz testified, that “you take it or there’s no job for you,” as well as in Gerber’s admitted response, “[N]o, we made the decision to ... move you permanently,” when Ortiz asked whether he had any choice. Insofar as the involuntary transfer violated Section 8(a)(3) of the Act, the threat to terminate Ortiz if he refused the transfer violated Section 8(a)(1) of the Act.

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The complaint alleges that the Respondent reduced the overtime of Ortiz on October 21, the date of the transfer. Ortiz’s testimony establishes that the reduction actually occurred two weeks later. Controller Metzger explained that the hours of the Retail Store varied, and that the store had shorter hours during the winter. Even with the shorter winter hours, the store remained open until 6 p.m. on Thursday and Friday. The job description for the position reflects that the hours of the position are the store hours. Because the store was open, an employee from Shipping had to be assigned to deal with orders needing to be filled after 3:30. The hire of two employees in Shipping belies a claim that things were slow. Gerber did not respond when Ortiz asked why he was being sent home at 3:30. Gerber did not address the limitation of Ortiz’s hours in his testimony or explain why, having been permanently assigned to the position, Ortiz was not permitted to work until the Retail Store closed. The unexplained limitation of the working hours of Ortiz, at variance with the working hours reflected on the job description, establishes that the limitation was imposed in retaliation for Ortiz’s union activities, and I so find.

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It is unclear when Ortiz ceased receiving overtime in Shipping. The foregoing change in working hours obviously deprived Ortiz of the overtime he had been earning at the Retail Store.

Vice President Gerber informed Ortiz that Supervisor Bowen did not need him. Ortiz credibly testified that, thereafter, he asked about working overtime in the Sizing Department and was informed that there was none. I shall leave the determination regarding the amount overtime of which Ortiz was deprived to compliance.

Miller's request that Ortiz keep her advised of bathroom and lunch breaks is consistent with her requirement that any employees who left the Retail Store advise her of that fact. Although the foregoing requirement was not discriminatorily issued only to Ortiz, it did constitute a change in his working conditions pursuant to the unlawful transfer and violated the Act.

#### 4. The Incident on November 1

On November 1, having received permission previously, Ortiz took his wife to a medical appointment, leaving about 9:45 a.m. and returning about 11:45 a.m. Pursuant to the Company no-fault absence policy, that absence, although authorized, would result in Ortiz receiving a negative ½ point on his attendance record. When he returned from the appointment, Ortiz resumed work. Supervisor Ruth Miller, apparently unclear regarding the attendance policy, consulted with Human Relations regarding the appropriate point assessment and whether Ortiz could complete the day's work. Karina Kolm provided her with the employee handbook. The employee handbook provision relating to leaving the premises requires supervisory approval of the absence and provides that employees may not clock back in until they have been absent for at least one hour. Shortly after speaking with Kolm, Miller testified that a "management official" came to her office and told her that Ortiz should be sent home. Ortiz, having returned to work, observed Vice President Tim Gerber enter Miller's office and then leave. Shortly thereafter, Miller came to him and told him that he would have to go home "because I did not bring a note from the doctor, that she was following Gerber's orders." Ortiz left at 2:30 p.m.

Gerber testified that he informed Miller that she was free to exercise her supervisory discretion regarding whether she would permit Ortiz to return to work. Miller, who never confirmed that the management official with whom she spoke was Gerber, testified that the management official told her that she was to send Ortiz home. Notwithstanding Miller's reluctance to identify the management official with whom she spoke, I credit her testimony that the official told her to send Ortiz home. I further find that the official was Tim Gerber.

The foregoing occurred on November 1, which was less than two weeks after Ortiz had been permanently assigned to the Retail Store. Thus, it would appear that this incident occurred prior to when Ortiz had been directed to leave work at 3:30 and occurred during the period that he would, upon completion of his work at the Retail Store, have reported to and obtained additional overtime in Shipping. The employee handbook provides that employees may not clock back in until they have been absent for at least one hour. Ortiz was absent for over an hour. Miller permitted Ortiz to return to work. She rescinded that permission when directed to do so by Gerber. Gerber's contrary testimony suggests that he sought to avoid having to explain the motivation for his action by denying that he instructed Miller to send Ortiz home. I find that Gerber directed Miller to send Ortiz home prior to the completion of his shift in retaliation for his union activity in violation of Section 8(a)(3) of the Act.

#### 7. The Warning on March 4, 2005

The Company, in order to comply with USDA guidelines, has adopted various procedures set out in a Hazard Analysis Critical Control Point plan (HACCP) and implemented those procedures in another document, Standard Sanitary Operation Procedures. Pursuant to the foregoing, when an unsanitary condition is detected by a quality control employee, the

employee will bring the condition to the attention of the appropriate supervisor. If the unsanitary condition is unable to be cleaned up immediately or if the supervisor is unavailable, the quality control employee will “red tag” the area. Compliance Manager Glen Mott explained that this procedure assures the USDA inspectors that the Company is in control of the facility, that

5 “[w]e’re taking care of this.” Until a month prior to the hearing the Company kept no record of red tags, “They got tossed.” A record is now kept.

Ortiz, consistent with the schedule that had been imposed upon him, left work on March 3, 2005, shortly after 3:30 p.m., although the Retail Store continued to operate because it was a

10 Thursday. Ortiz was supposed to hand off the radio that kept him in touch with the Retail Store to the Order Processing employee who assumed his duties. Ortiz could not locate an employee to whom he could give the radio, and he left it on the counter in the retail store, explaining to the employees who continued to work what he was doing. The following day, Ortiz informed Miller “about the radio,” and she told Ortiz that she would take care of it. During the day on March 3, a

15 customer had ordered a 40 pound box of chicken tidbits. Ortiz, who was prohibited from entering the freezer, had unsuccessfully sought to locate an employee who was authorized to enter the freezer to obtain the box. After being called on the radio by Supervisor Miller, Ortiz entered the freezer and obtained the box. In order to reach the box, he had to step on a pallet of frozen chicken.

20 Supervisor Mike Bowen testified that “about between three thirty and quarter until four” he observed the WIP cooler in an unclean condition, trash was overflowing and there were containers that had not been properly closed. He called Sales and Marketing Manager Barry Livingston to be a witness because he was aware that, on other occasions, Order Processing

25 employees had been accused of leaving the WIP cooler in an unclean condition. Bowen took pictures of the area.

Craig Diodati, a line leader in Order Processing, testified on cross-examination that on the afternoon that Supervisor Bowen discovered that the WIP cooler was dirty, within an hour,

30 he directed Diodati and another employee to clean the area. The area had been red tagged. Diodati confirmed that the Retail Store was still open. He also testified that, although Ortiz was responsible for cleaning the area before he left at 3:30, the Order Processing employee who performed Ortiz’ job duties until the Retail Store closed would be responsible for leaving it clean before leaving, at around 6. On redirect examination, Counsel for the Respondent asked if it

35 could “have been the day after it had been found dirty” that he was asked to clean the area. Diodati answered, “It could have been.” I find that Diodati cleaned the area “within an hour.”

At 5:45 on the morning of March 4, 2005, documentary evidence establishes that quality control employee Diane Bowen found the WIP cooler area dirty and red tagged it. Ortiz

40 confirmed that when he reported to work on March 4, the WIP cooler area was red tagged.

Near the end of his shift on March 4, Ortiz was called to a meeting. Controller Metzger and Livingston were present. Ruth Miller was not. Ortiz asked where his supervisor was and Metzger answered, “You’re looking at him.” It is unclear whether Metzger was referring to

45 himself or Sales and Marketing Manager Livingston. Metzger did not supervise Ortiz, and he reports to President Michael Gerber. Livingston testified that Miller reported to him, although he acknowledged that he did not write her evaluation. Vice President Gerber testified that Miller reports directly to him as does Livingston. Gerber was present when Ortiz received his 2004 evaluation. I find that neither Metzger nor Livingston were supervisors of Ortiz.

Metzger told Ortiz that he was giving him a written warning because he had left the WIP cooler dirty the previous day, he had stepped on a pallet, he was not giving freezer orders to

Tim Kraft, and he had left the radio on the counter in the retail store. Metzger showed Ortiz the pictures that Bowen had taken.

Ortiz responded that a barrel of trash shown in one of the pictures was not his and that he did not leave the WIP cooler in the condition shown. He explained that he had left the radio on the counter, where it is recharged, because his responsibilities ended at 3:30. He admitted standing on the pallet because a customer was waiting. He explained that he places freezer orders in “a plastic thing” for Tim Kraft, who keeps up with the freezer inventory. He accused Metzger of setting him up.

Livingston acknowledges that Ortiz denied leaving the WIP cooler in the condition shown, and he admits that he accused Ortiz of lying with regard to that denial. He did not deny that, when he made his accusation, Ortiz responded, “You want me to lie. I did it. That’s a lie.”

Metzger agrees that Ortiz denied responsibility for the condition of WIP cooler. He denies that Ortiz accused him of “setting him up.” He contends that he read a typed page that is appended to the warning. He did not speak with Ortiz prior to issuing the warning.

Ortiz, Diodati, former Retail Store Customer Assistant Eldon Snowden, as well as Bowen and Metzger agree that the WIP cooler was often or sometimes, depending upon the testimony of the particular witness, left in a messy condition. Bowen recalled that the area had actually been red tagged “a handful of times” and that, typically, Order Processing was called to clean up the area in the morning. He was concerned that Order Processing employees were being blamed. On March 3 he took pictures. If the area was to have been left so that Ortiz could be confronted with his alleged dereliction the following morning, there would have been no need to take pictures. The Respondent’s brief does not address the testimony of Diodati, which I have credited, that he and another employee, at the direction of Bowen, cleaned the area.

The foregoing facts lead to the conclusion that, because the Retail Store was operating, the WIP cooler could not be left red tagged until the following morning. It had to be placed back into service. Therefore, in order to document its condition, Bowen took pictures. Diodati and another employee cleaned the area that afternoon. Despite their having done so, it was found to be dirty on the morning of March 4, and it had been red tagged again.

The first item noted on the typed page that Metzger claims to have read to Ortiz cites him for entering the freezer and stepping on a pallet. Virtually every witness who testified agreed that a first offense of stepping on a pallet would not result in formal discipline. The warning was written without confronting Ortiz concerning the allegations. Thus, Metzger was unaware that Ortiz had unsuccessfully sought to find an authorized individual to enter the freezer. After receiving a call on the telephone from his direct supervisor, Ortiz made the decision that the customer comes first and obtained the product he was seeking.

Kraft did not testify. Ortiz explained that he would place the order sheets in a plastic container for Kraft. Bowen was aware that Ortiz had obtained the chicken tidbits that the customer had ordered. He testified that Kraft told him “that box was in retail.”

The General Counsel established a prima facie case that the written warning issued to Ortiz on March 4 was motivated by its animus towards his union activity. The Respondent has not established that Ortiz would have been warned in the absence of his union activity.

Metzger, although purportedly investigating the lack of cleanliness in the WIP cooler, did not seek to determine when the area had been cleaned or the circumstances regarding it having

been red tagged at 5:45 a.m. on March 4. It appears that Metzger assumed that the red tag in the morning resulted from the condition in which Ortiz had purportedly left the area on the afternoon of March 3, notwithstanding that the Retail Store had operated for almost three hours thereafter. He did not testify that he spoke with Diodati, and Diodati testified that he was not involved in the investigation. If Metzger had spoken to line leader Diodati, he would have learned that Diodati had cleaned the area and that Ortiz could not have been responsible for the WIP cooler having again been red tagged on the morning of March 4.

If the Respondent's purpose was to discipline all employees responsible for leaving the WIP cooler in an unclean condition, Metzger's investigation would have included seeking to determine who was present in the WIP cooler after Ortiz had left. "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). Although all witnesses agree that the WIP cooler had been left in less than pristine condition on various occasions and had previously been red tagged on several occasions, no investigation regarding who was responsible had ensued. There is no evidence that any employee had previously been disciplined for leaving the area unclean. The photographs taken by Bowen and the inclusion in the warning of the offense of stepping on a pallet suggests that Metzger was intent upon establishing a paper trail relating to Ortiz upon which the Respondent could rely in the future. I find that the written warning issued to Ortiz on March 4 was issued in retaliation for his union activity and violated Section 8(a)(3) of the Act.

#### 6. The Suspension on March 16, 2005

On March 16, 2005, Ortiz distributed a four page union leaflet. He placed stacks of the leaflets on the employee lunchroom tables. The four page leaflet was a folded 8 1/2 by 11 sheet of paper in Spanish. The first page, after citing actions that the Company had taken regarding capital improvements, asks, in Spanish, "What about the workers?" The third page, the page that would be immediately seen when opening the leaflet, states, "Rociemos un poco a ellos." "Rociada" is appropriately translated as either "spray" or "sprinkle." *The Random House Dictionary*, Second Edition, Appendix: The Concise Spanish Dictionary, 2320 (1987). Thus, the message was, "Let's spray (or sprinkle) a little on them." Below the caption is a cartoon figure. The depiction is from the rear of the figure. A cigar emitting smoke at where the figure's mouth would be if it could be seen and a bald head establish that the figure is male. The upper right arm is next to his body. The lower right forearm is bent in the direction of the cartoon figure's groin. The cartoon figure's hand is not shown, nor are any groin organs. Standing at the feet of the cartoon figure are eleven figures approximately one inch high. Between the groin area of the figure whose back is shown and the small figures before him is a series of dashes, suggesting the emanation of a liquid. The standing figure, on the 5 1/2 by 8 1/2 page, is approximately 6 inches high. The figures beneath the dashes are approximately 1 inch high. All Company witnesses who testified regarding the foregoing leaflet stated that it appeared to reflect management urinating upon the employees. I concur. There is no other rational interpretation of the cartoon. Upon confirming that Ortiz was responsible for the distribution of the leaflet, the Company suspended him for 3 days.

Whether Ortiz told any employees that the male cartoon figure was Controller Metzger is immaterial. He denied doing so, but admitted distributing the leaflet. The wording of the leaflet, leaves no rational interpretation of the cartoon other than management urinating upon employees. The General Counsel argues that the leaflet was protected. I disagree. Although unions are granted great leeway with regard to organizational propaganda, obscene personal attacks are not protected. *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985). Nonconsensual touching and indecent exposure are criminal acts. Both of those acts are implicit in the cartoon.

I find that the cartoon was defamatory and that the Respondent was fully justified in suspending Ortiz for distributing the document that contained the cartoon. I shall recommend that the allegation relating to the suspension of Ortiz be dismissed.

The complaint alleges that President Michael Gerber interrogated Ortiz and threatened him with discharge for engaging in union activity. Ortiz testified that Gerber approached him and asked if he had written the document. Ortiz denied having done so. Thereafter, on the afternoon of March 16, 2005, when Ortiz was suspended, President Gerber informed him that he had determined that Ortiz was not responsible for the content of the document. He noted that, if he had been, he would have been terminated. Insofar as the leaflet is not protected by the Act, neither the Respondent's actions in seeking to determine who authored the leaflet nor the statement that, if Ortiz had been responsible, he would have been discharged violated the Act. I shall recommend that those allegations also be dismissed.

## 7. The Incident on March 24, 2005

Following his suspension, Ortiz returned to work. On March 24, Compliance Manager Glen Mott spoke with Ortiz next to the desk of and in the presence of Supervisor Ruth Miller. Mott asked Ortiz whether he understood the no solicitation policy. Ortiz replied that he did. Mott stated that he wanted to remind Ortiz that it included “not buying or selling during working hours” and “not to talk to them [employees].” Ortiz asked what he was to do if they spoke to him, was he supposed to bring his supervisor so she could hear. Mott told Ortiz not to “get smart” with him. Miller confirmed that Ortiz questioned Mott as to whether he could talk to employees, such as saying “good morning” and that Mott “cut him off and said no, you know what we’re talking about.”

Mott testified that he had this conversation because employee Delio Juarez asked him if he “could please get Johnny [Ortiz] to stop talking to him ... about the Union, he was tired of it.”

The complaint alleges that the Respondent changed the working conditions of Ortiz by requiring him to refrain from talking and interacting with coworkers in violation of Section 8(a)(3). Ortiz's testimony establishes that when he sought to place that interpretation upon Mott's remarks that Mott told him not to "get smart" with him. Miller confirms the tenor of the meeting, recalling that Mott commented that Ortiz knew what he was talking about. The foregoing exchange constituted a reaffirmation of the Respondent's unlawful restriction that equated any prounion conversation with solicitation. The foregoing violated Section 8(a)(1) of the Act. I shall recommend that the Section 8(a)(3) allegation be dismissed.

## 8. The Unfavorable Evaluation and Denial of a Wage Increase

On April 13, 2005, in a meeting with Supervisor Ruth Miller and Vice President Tim Gerber, to whom Miller reports, Ortiz received his annual evaluation that reflected a total score of 16. The factor of attitude, rated at 2, states that Ortiz "is friendly with customers." It continues, stating, "Attitude towards management needs to improve. When at work needs to keep his mind on work." Ortiz questioned this, and Gerber stated that maybe Ortiz was thinking about his girlfriend. Ortiz replied that he was married. Miller said nothing. Metzger testified that, at the review committee, Miller explained that there were occasions when Ortiz was "not responsive to her and does not follow her direction." I do not credit that testimony. That comment was not made when Ortiz discussed the evaluation with Miller and Gerber. If Ortiz had failed to be responsive and follow directions, that is what the evaluation would have said, just as it reported that he was friendly with customers. If Ortiz had not followed directions, Miller would have warned him. Miller was not called as a witness to corroborate Metzger. Although referring to a

need for Ortiz to “keep his mind on work,” when rating his work quality and work quantity, the evaluation states that Ortiz “Does good to make [sure] that the customer gets the product that they had ordered” and “Does very good in getting the orders from the clipboard & get them ready for the next day.” Miller informed Ortiz that he would not receive a raise. Ortiz questioned Vice President Gerber about this and he replied that the rate that Ortiz was receiving “surpassed your pay scale” for the Retail Store.

Controller Metzger testified that Ortiz’s score did not matter because he was being paid in excess of the Retail Store pay scale. I have not credited Metzger’s uncorroborated testimony that Miller stated that the attitude reference related to any failure by Ortiz be responsive or follow directions. Whether the reference to Ortiz needing to improve his attitude “towards management” related to his accepting with equanimity the discriminatory actions that had been taken against him or to disavowing his union sympathies is immaterial. Whatever deficiencies the Respondent perceived with regard to Ortiz’s attitude are directly attributable to either his pronoun sentiments or the discrimination against him. I have found that the transfer of Ortiz and imposition upon him of unfavorable working conditions, including specifically being placed on a lower wage scale and ending his workday at 3:30 even when the Retail Store remained open, violated Section 8(a)(3) of the Act. The evaluation should not have been performed by Miller because Ortiz should not have been permanently assigned to the Retail Store.

I find that the unfavorable evaluation of Ortiz and failure to grant him a wage increase violated Section 8(a)(3) of the Act.

## 9. The Discharge

### *a. Facts*

Ortiz was discharged on May 2, 2005. He was called to the training room where Compliance Manager Mott and Controller Metzger were present. Translator Kolm was also present. Neither Ruth Miller, Ortiz’s immediate supervisor, nor Vice President Tim Gerber, to whom Miller reports, were present. Mott informed Ortiz that he was being discharged for insubordination, mixing orders, and complaints that he was taking too long to fill orders.

Mott conducted the meeting. He cited no details. He claims that he read the final paragraph of a three page document that Metzger had prepared. That paragraph states that Ortiz failed to follow his supervisor’s instructions, follow proper procedures, and perform all his job duties. It refers to “performance deficiencies” that had resulted in unusable product, customer relations issues, and problems with the Retail Store operation. It concludes stating, “Additionally when confronted by his supervisor, Ruth Miller, about some of these performance issues this morning, Johnny responded in a flippant manner. Johnny was both insubordinate and disrespectful toward Ruth Miller. As a result of these continuing performance concerns, Johnny’s employment with Gerber Poultry is being terminated, effective immediately.”

Mott testified that, when he concluded his reading, Ortiz said, “What took you so long?” Ortiz admitted making the foregoing comment, explaining that, from the moment that he began “trying to ... organize ... the [U]nion I had all those problems. I went through all these problems. I knew the Company wanted to fire me anytime. That’s why ... I told them, ‘What took you so long to fire me?’ knowing ... that a week later we were going to have our first hearing here.” Neither Mott nor Kolm corroborated Metzger’s claim that Ortiz said this in a laughing manner, and I do not credit that testimony.

Ortiz told Metzger and Mott that he felt the termination was discriminatory, explaining

that he had found trash in his work area after the weekends, that "a white woman can leave it, there's no problem" but that the Company tried to blame the Hispanic employees and that was the way he felt "we were treated by the Company." Lack of concern for employees had been depicted, albeit in a defamatory manner, in the union's March leaflet which Ortiz distributed.

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Ortiz explained that, upon reporting to work on the morning of May 2, 2005, he observed, as he had discovered the previous weekend, that trash had been left out. Ortiz had been disciplined on March 4, 2005, for the condition of the WIP cooler. He spoke with Supervisor Miller regarding the condition in which the Retail Store had been left, stating, "I don't want to get in trouble with the Company because there's many problems right now." She stated that she would take care of it, but that Ortiz should clean up the mess that had been left. He did so. He credibly denied that he was disrespectful.

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Mott testified that, although he could not recall the exact words, Supervisor Ruth Miller reported to him that Ortiz had been "'huffy,' 'mouthy,' 'rude,' stuff like that," that she had asked Ortiz to clean up after another employee, and that Ortiz told her that "he wasn't going to be cleaning up after this girl and Ruth better be getting things straightened up herself because he wasn't going to be doing this type of thing." It is obvious that Ortiz did not make that statement because it includes Miller's first name. I do not credit Mott's testimony. It was not corroborated by Miller. There is no contention that Ortiz refused to do what he was asked to do.

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Mott testified that he met with Metzger. He did not state whether he told him what Miller had purportedly told him or whether he simply asserted that Ortiz had been insubordinate. The document delineating the various derelictions for which Ortiz was supposedly discharged does not contain any insubordinate comment. It states that Ortiz responded to his supervisor in a "flippant" manner and was "insubordinate and disrespectful."

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Metzger testified that, about 9 a.m., Donna Gerber, wife of President Michael Gerber, "made mention to me about the issues on the—uh, improperly product given to customers," purportedly by Ortiz. Invoicing employee Shirley Meteal "brought it forward to her [Donna Gerber]." Supervisor Ruth Miller, whom the Respondent did not call as a witness with regard to Ortiz's discharge, was not consulted by Metzger and did not testify regarding the responsibility of Ortiz for any of the purported errors supposedly reflected upon the information that Donna Gerber and Meteal, neither of whom testified, assembled and provided to Metzger.

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Metzger prepared a document, the second sheet of the discharge document, which delineates various errors attributed to Ortiz. Metzger testified about a purportedly incorrect order being given to a customer by Ortiz on April 27, 2005. The customer supposedly reported that he had received more boxes of chicken than he had ordered. Metzger initially placed the date as April 25, but then corrected himself. Metzger claimed that learned from Donna Gerber that on Monday, April 25, 2005, there were "uh, other -- uh, orders given out improperly to customers, that Mr. Ortiz was involved with" and that "we were able to assemble information that supported the findings on this document here," referring to the second page of the termination document, was supposedly responsible but about which he was never questioned.

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When called in rebuttal after Metzger's testimony, Ortiz explained that Shirley Meteal takes the orders and "there's no way that I have it wrong because I didn't take that order." Regarding the April 27, 2005, incident, Ortiz explained that Edward Baumgartner, a regular customer, arrived. There were eight boxes with his name on the boxes. When Ortiz looked at the invoice he informed Baumgartner that "you have an order for six boxes, but there's two extra boxes with your name on it." Baumgartner told Ortiz that he would sell them and to give them to him. Ortiz called Meteal and informed her that there were two extra boxes, that Baumgartner

was taking them, and that Baumgartner would come to the invoice department.

Supervisor Mike Bowen, who would have been Ortiz's supervisor but for the discriminatory transfer, testified that it was his practice to issue a verbal warning for a single mistake regarding an order and that a written warning would be issued upon repetition or if errors became a pattern. This is confirmed by Respondent's Exhibit 25 which reflects that on June 10, 2003, employee Kris Trent was issued a counseling after he "misloaded 5 trucks" in one week, and on January 19, 2005, when Trent received a verbal warning for three instances of "short weights." None of the alleged errors compiled by Metzger had been brought to Ortiz's attention during the previous week, nor were they specifically cited on May 2, 2005.

Metzger was present throughout the hearing as the Respondent's representative after the sequestration rule was invoked. Bowen testified prior to Metzger. After that testimony and Metzger's testimony regarding the order errors for which Ortiz allegedly bore responsibility, Counsel for the Respondent asked whether Metzger determined, as a result of his investigation, "that it was appropriate to issue disciplinary action?" Metzger answered, "Yes." Counsel then asked, "Why termination?" Metzger answered, "The -- uh, the issues regarding the product, -- uh, probably would not have resulted in a termination. However, the insubordination with Ms. Miller I thought was a -- I concluded was enough to -- to end this. He was being very defiant with Ruth Miller that morning according to Mr. Mott. And enough was enough."

On cross-examination, when Metzger was asked whether he talked with Ortiz regarding problems with orders, Metzger answered that he did not because "[i]t was a moot point at that point in time" because he had made the decision to terminate him.

Mott's testimony indicates that the discharge decision was made jointly by him and Metzger. When asked, "And did you participate in making the decision to termination Mr. Ortiz?" Mott answered, "Yes." Both Mott and Metzger report to President Michael Gerber.

Ortiz's supervisor, Ruth Miller, reports to Vice President Tim Gerber. She had previously supervised employee Eldon Snowden who was transferred to another department for "abuse of time." On June 10 and August 13, she issued warnings to Snowden for taking unauthorized breaks. The Respondent did not present Miller as a witness with regard to Ortiz's discharge.

Counsel for the General Counsel asked Ortiz, "Mr. Ortiz, have you ever been insubordinate or disrespectful to Ruth Miller your supervisor?" Ortiz answered, "No, I've always tried to be very respectful with her and she as well; she has been very respectful towards me also." The foregoing testimony is uncontradicted and I credit it.

#### *b. Analysis and Concluding Findings*

The General Counsel, pursuant to *Wright Line*, supra, has established that the Respondent was aware of Ortiz's union activities, that the Respondent bore animus towards him because of those activities, and that his involvement in those activities was a substantial and motivating factor in the decision to discharge him.

The second page of the sheet that Metzger prepared, the sheet that was not read to Ortiz at the time of his termination, contains a number of alleged derelictions, none of which relate to disrespect or insubordination. Metzger testified that he did not confront Ortiz with that information that he had gathered from Donna Gerber and Shirley Meteal because the issue was "moot;" he had already made the decision to terminate Ortiz.

The Respondent's brief states that Miller reported to Mott that Ortiz was insubordinate to her, but it does not address the fact that the content of that report is hearsay. Miller did not testify to any insubordination. The Respondent argues that the alleged mistakes in orders, none of which Ortiz was given the opportunity to address, establish a nondiscriminatory termination. I reject that argument. The Respondent's practice, according to Bowen to whom Ortiz would report but for his unlawful transfer, is first to bring such errors to the employee's attention. Discipline is issued upon repetition or if a pattern develops. This is confirmed by the discipline issued to Kris Trent for five instances of misloading and three instances of short weights. Ortiz was never informed prior to his discharge of any error. Even if Ortiz, who was required to leave work at 3:30, bore some responsibility for some of the alleged errors, the disparity between the manner in which Ortiz was treated as compared to employee Trent and the failure to give Ortiz the opportunity to address his purported mistakes establishes the Respondent's discriminatory motive. *New Orleans Cold Storage Co.*, 326 NLRB 1471, 1477 (1998).

The Respondent's brief does not address Metzger's testimony that the overriding issue was "the insubordination with Ms. Miller." If the alleged errors relating to orders as reported by Donna Gerber and Metcal justified termination, a minimal investigation would, at the least, have included consultation with Supervisor Miller. An impartial investigation would have provided Ortiz the opportunity to explain the alleged errors. Metzger testified that he did not confront Ortiz because he had already decided to terminate him. Insofar as no explanation regarding the orders was relevant to Metzger, the only logical conclusion to be made is that the termination decision was based upon Ortiz's purported insubordination, the only evidence of which was the uncorroborated report of Compliance Manager Mott. Metzger never spoke to Miller.

Although, according to Metzger, he concluded that "the insubordination with Ms. Miller ... was enough to -- to end this," Metzger never testified to the content of Mott's report. He characterized Ortiz's conduct as being "very defiant," but the discharge document describes whatever comment Ortiz made as being "flippant." Metzger oversaw Human Resources; he had no supervisory authority over Ortiz. He did not speak with Ortiz's direct supervisor, Ruth Miller, the individual to whom Ortiz had supposedly been insubordinate, or to Ortiz.

Any semblance of an impartial investigation would require that Metzger confirm with Mott exactly what Ortiz had purportedly said, confirm with Miller what was said, and speak with Ortiz. The failure of the Respondent to investigate Mott's report of alleged insubordination confirms that the Respondent was determined to terminate Ortiz. Metzger never spoke with Miller. If Ortiz had been insubordinate to Miller or if she had determined that he had been responsible for any errors in orders or in the performance of his duties, she would have issued him a warning, just as she had warned Snowden. She did not do so. Miller issued no discipline to Ortiz and was not involved in the decision to terminate her employee.

Regarding Mott's report of insubordination, his testimony that he received a report from Miller is not hearsay. The content of the report is hearsay regarding the truth of what was allegedly reported. Mott's testimony regarding the content of the report is testimonial evidence subject to corroboration or contradiction and evaluation with regard to credibility. Ortiz credibly testified that he was always respectful to Supervisor Miller. Miller was not called to contradict that testimony, and I credit it. I do not credit Mott's testimony that Miller reported that Ortiz was insubordinate. Mott could not recall the specific word or words that Miller used in characterizing Ortiz's attitude, and the statement that Mott claims that Miller attributed to Ortiz, that "Ruth better be getting things straightened up," is a paraphrase. I credit Ortiz and find that the statement that he made to Miller was, "I don't want to get in trouble with the Company because there's many problems right now."

The Respondent did not present Miller to corroborate Mott's testimony regarding the report made to him. The failure of the Respondent to present Miller suggests that, if called to testify, Miller would deny that Ortiz was insubordinate to her or that she made any such report to Mott. The Respondent's failure to corroborate Mott's testimony, upon which the Respondent  
 5 claims to have based its actions, compels the conclusion that Miller did not report insubordination but continuing concern by Ortiz regarding not wanting to "get in trouble with the Company." When Eldon Snowden engaged in misconduct, Miller issued discipline as reflected in the warnings of June 10 and August 13. Miller issued no discipline to Ortiz. I do not credit  
 10 Mott's testimony that Miller reported to him that Ortiz was insubordinate to her. If Ortiz had been insubordinate to Miller, she would have disciplined him just as she disciplined Snowden.

The Board, in *Golden Foundry & Machine Co.*, 340 NLRB No. 140 at slip op. 2 (2003), restated longstanding precedent regarding false reports made by supervisors.

15 It is well established that if a supervisor provides a false report that leads to a discharge, that supervisor's unlawful motivation is imputable to the employer, even if the official who actually makes the discharge determination is unaware of the supervisor's animus. See, e.g., *JMC Transport, Inc. v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985); *Springfield Air Center*, 311 NLRB 1151 (1993). See *Grand Rapids Die Casting Corp. v. NLRB*, 831  
 20 F.2d 112, 117- 118 (6th Cir. 1987); and *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982).

In this case, both Metzger and Mott, as well as Vice President Tim Gerber, who involuntarily transferred Ortiz to the Customer Assistant position, demonstrated animus towards  
 25 to Ortiz. Although Metzger claims to have made the decision to discharge Ortiz, Mott testified that he was also involved. Any assertion that the discharge was not discriminatory is undercut by the fact that neither Mott nor Metzger were in Ortiz's supervisory chain of command. Incredibly, Vice President Tim Gerber, to whom Miller reports, was, so far as this record shows, neither involved in nor aware of the decision of Metzger and Mott, neither of whom supervised  
 30 Ortiz, to discharge him. The fact that Supervisor Ruth Miller, to whom Ortiz had purportedly been insubordinate, was not involved in the discharge decision belies any claim that any alleged misconduct by Ortiz was the basis for the Respondent's action.

The Respondent's discharge of Ortiz, rather than transfer, further confirms the  
 35 Respondent's discriminatory motivation. Former Customer Assistant Elton Snowden was not terminated but transferred for "abuse of time." When employee Stacey Zurcher was warned regarding performance problems, she was offered the opportunity to transfer.

I find that the Respondent discharged Ortiz upon a pretext of insubordination that did not  
 40 occur. When a respondent's asserted reason for an adverse personnel action is either false, or does not exist, the respondent has not rebutted General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). I find that the Respondent discharged Ortiz because of his union activities in violation of Section 8(a)(3) of the Act.

#### 45 *E. The Surveillance Allegation*

On November 12, Organizer Tim Mullins picketed at the Company plant. He was joined for a period of time by four individuals from another company. Mullins testified that, throughout the day, as he was picketing, various supervisors would come outside of the Company office and watch him. No photographs were taken. When employee Otto "Johnny" Ortiz got off work at 3:30, he joined Mullins. As the Tray Pack Department was leaving, employee Claudette King, apparently having observed the picketing, turned around and drove her vehicle to the edge of

the truck parking lot. Ortiz recalled that Metzger yelled at her saying “Claudette, go home.” The record does not establish whether the employee, who did not testify, heard him. Mullins did not hear him. Mullins observed Metzger walking rapidly towards the employee’s vehicle saying something that he could not hear. Metzger then addressed Mullins, saying “Tim, no blocking the drive.” Mullins answered Metzger saying, “John, no surveillance.” Metzger left. No comments were directed to Ortiz.

The foregoing facts do not establish unlawful surveillance. Prior to the arrival of Ortiz, no employee of the Respondent was involved in the picketing or, so far as the record shows, even aware that the picketing was occurring. In *St. Mary’s Hospital*, 316 NLRB 947 (1995), the Board held that the respondent therein had not created an impression of surveillance because the only surveillance that had occurred was of nonemployee union organizers who had been asked to leave the visitors’ entrance to the hospital and had thereafter been surveilled as they handbilled on a public sidewalk. The Board reasoned that there could have been no impression of surveillance since there was no evidence that the Respondent’s surveillance was “directed at any of its employees” or was “observed by any of its employees.” *Ibid.* The observation of Mullins and the three nonemployees with him, prior to the arrival of Ortiz, did not constitute unlawful surveillance. After Ortiz arrived, the evidence establishes a brief encounter in which Metzger made a comment to a nonpicketing employee and told Mullins not to block the drive. The foregoing interaction did not constitute surveillance. No comment was made to Ortiz, and neither he nor Mullins testified to any interference with or observation of their activities thereafter. I shall recommend that this allegation be dismissed.

#### Conclusions of Law

1. By threatening employees with physical violence because of their activities on behalf of the Union, coercively interrogating employees regarding the reasons for their pronoun sympathies, threatening discharge for failure to accept a discriminatory job transfer, and imposing a gag rule prohibiting all discussion about unions during working time while not prohibiting discussion about other nonwork topics during working time, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing an unfavorable evaluation to and depriving Carlos Manuel Garcia of a wage increase because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By transferring Otto Ortiz, thereby depriving him of a morning and afternoon break and requiring him to report anytime that he left the Retail Store, and requiring that he leave work at 3:30 p.m., thereby depriving him of overtime work, because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

4. By sending Otto Ortiz home before the completion of his shift on November 1, 2004, because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

5. By issuing a written warning to Otto Ortiz on March 4, 2005, because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

6. By issuing an unfavorable evaluation to and depriving Otto Ortiz of a wage increase pursuant to the wage scale for the position to which he had been discriminatorily transferred, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

7. By discharging Otto Ortiz because of his union affiliation and activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily transferred and discharged Otto Ortiz, it must offer him reinstatement to his former position in Shipping and Order Processing and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from May 2, 2005, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily deprived Otto Ortiz of overtime work, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis from November 1, 2004, until his overtime assignments are restored, as prescribed in *F. W. Woolworth Co.*, *supra*, plus interest as computed in *New Horizons for the Retarded*, *supra*.<sup>2</sup>

The Respondent having discriminatorily warned Otto Ortiz on March 4, 2005, it must rescind that warning.

The Respondent having discriminatorily evaluated Otto Ortiz and Carlos Manuel Garcia, it must expunge those evaluations from its files and make Ortiz whole for the denial of the raise that he would have received but for his discriminatory transfer and make Garcia whole for the denial of the raise that he would have received but for the unlawful unfavorable evaluation.<sup>3</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

<sup>2</sup> I have credited Ortiz's testimony that he continued to receive overtime in Shipping until he was directed to leave work at 3:30 p.m. The requirement that Ortiz leave work at 3:30 p.m. deprived him of overtime in the Retail Store and in Shipping. On November 1, he was sent home at 2:30 p.m., which deprived him of both Retail Store and Shipping overtime.

<sup>3</sup> The record contains the Respondent's pay scale ranges for 2004, not 2005. The records reflecting raises given to two other line leaders, WOLF and RIAZ, are in the record. I shall leave for compliance the determination of the amount of the raises that Ortiz and Garcia would have received but for the discrimination against them.

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, Gerber Poultry, Inc., Kidron, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening employees with physical violence because of their activities on behalf United Food and Commercial Workers Union, Local No. 880, AFL-CIO, CLC.

(b) Coercively interrogating employees regarding the reasons for their union sympathies.

(c) Threatening employees with discharge for failure to accept a discriminatory job transfer.

(d) Imposing a gag rule prohibiting all discussion about unions during working time while not prohibiting discussion about other nonwork topics during working time.

(e) Issuing unfavorable evaluations to employees and depriving them of wage increases because of their union activities.

(f) Transferring employees to positions with unfavorable working conditions including the deprivation of overtime work because of their union activities.

(g) Issuing written warnings to employees because of their union activities.

(h) Discharging employees because of their union affiliation and activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, rescind the unlawful transfer of Otto Ortiz and offer Otto Ortiz full reinstatement to his former job in Shipping and Order Processing or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole Otto Ortiz for any loss of earnings and other benefits suffered as a result of his discriminatory transfer, including the deprivation of overtime work, and his discharge in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, rescind the unlawful warning issued to Otto Ortiz on March 4, 2005.

(d) Within 14 days from the date of this Order, expunge the discriminatory unsatisfactory job evaluations issued to Otto Ortiz and Carlos Manuel Garcia.

(e) Make Otto Ortiz and Carlos Manuel Garcia whole for the denial of the raises that they would have received but for the unlawful unfavorable evaluations.

(f) Within 14 days from the date of this Order, remove from its files any reference to the

unlawful discharge, warnings, and evaluation of Otto Ortiz and the unlawful evaluation of Carlos Manuel Garcia, and within 3 days thereafter, notify them in writing that this has been done and that the foregoing will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Kidron, Ohio, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2004.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 29, 2005

George Carson II  
Administrative Law Judge

<sup>5</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT threaten any of you with physical violence because of your activities on behalf of the United Food and Commercial Workers Union, Local No. 880, AFL-CIO, CLC.

WE WILL NOT coercively interrogate any of you regarding your prounion sympathies.

WE WILL NOT threaten you with discharge for failing to accept a discriminatory job transfer.

WE WILL NOT impose a gag rule prohibiting all discussion about unions during working time while not prohibiting discussion about other nonwork topics during working time.

WE WILL NOT issue unfavorable evaluations and deprive you of wage increases because of your union activities, and WE WILL, within 14 days from the date of the Board's Order, expunge the unsatisfactory job evaluations issued to Otto Ortiz and Carlos Manuel Garcia and WE WILL make them whole for the denial of the raises that they would have received but for the unlawful unfavorable evaluations.

WE WILL NOT transfer you to positions with unfavorable working conditions, including the deprivation of overtime work, because of your union activities.

WE WILL NOT issue written warnings to you because of your union activities and WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful warning issued to Otto Ortiz on March 4, 2005.

WE WILL NOT discharge any of you because of your union affiliation or activities and WE WILL, within 14 days from the date of the Board's Order, having rescinded the transfer of Otto Ortiz, offer Otto Ortiz full reinstatement to his former job in Shipping and Order Processing or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings, including overtime of which he was deprived because of his discriminatory transfer, and other benefits suffered as a result of his discriminatory discharge in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge, warning, and evaluation of Otto Ortiz and the unlawful evaluation of Carlos Manuel Garcia, and within 3 days thereafter, notify them in writing that this has been done and that the foregoing will not be used against them in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GERBER POULTRY, INC.

(Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

1240 East 9<sup>th</sup> Street, Federal Building, Room 1695, Cleveland, Ohio 44199–2086

(216) 522–3717, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (216) 522–3723